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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91214448
Party	Defendant Michael F. Ball
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Date	03/25/2014
Attachments	8 - Mar.25.2014 Ball's Reply in Support of Motion to Dismiss.pdf(176523 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RED BULL GMBH

v.

MICHAEL F. BALL,

Applicant.

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Opposition No. 91208003
(Parent)
Opposition No. 91214448

**APPLICANT’S REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS OPPOSITION No. 91214448 PER FED. R. CIV. P. 12**

The Board’s order of February 20, 2014 granted Red Bull’s motion to consolidate this proceeding with Opposition No. 91208003. The order states, in part, “because these proceedings are being consolidated before the filing of the answer in Opposition No. 91214448 and to the counterclaim filed against Reg. No. 3939863 in Opposition No. 91208003, applicant and opposer must file its answer in each proceeding, following which subsequent filings should be filed only in the parent case.” Opposition No. 91214448, Doc. No. 5 at 2 (TTAB Feb. 20 2014)(emphasis added). At present, neither answer has been filed. Thus there are no subsequent filings to be filed only in the parent case. The parties’ respective motions to dismiss pertain to facts and issues unique to each proceeding.

On February 21, 2014, in Opposition No. 91214448 Applicant filed its motion to dismiss. Red Bull’s response was due to be filed on or before March 13, 2014. 37 C.F.R. § 2.127. The current document index in Opposition No. 91214448 shows that Red Bull has not filed a response in opposition to the motion. Thus Applicant’s motion should be treated as conceded and this proceeding should be dismissed. *Id.*

On March 5, 2014, Red Bull filed a response to the instant motion, but filed it in Opposition No. 91208003. Should the Board find Red Bull's response timely and give it due consideration, Applicant hereby replies in support of its motion to dismiss.

Red Bull does not contest the facts in this motion. Rather Red Bull admits "only the cover sheet for the opposition was uploaded, and the actual complaint was somehow inadvertently omitted."¹ See Red Bull's brief in response at p.2. Red Bull further adds that there was a "technical problem encountered by TTABVUE in uploading" the complaint. See Red Bull's response at footnote 1. Thus there is no dispute that Red Bull did not confirm through filing receipt and TTABVUE that all documents were properly transmitted prior to the close of the opposition period.

"It is the duty of the party making submissions to the Board via the Board's electronic filing system ('ESTTA') to ensure that they have been entered into the trial record. ... Parties are urged to check not only the ESTTA filing receipts but also to check TTABVUE, the Board's electronic docket information and file database, to ensure that all documents have been properly transmitted." *Weider Publications, LLC v. D&D Beauty Care Company, LLC*, 109 USPQ2d 1347, 1350-1351 n.9 (TTAB 2014)(finding objection to Notice of Reliance moot because only cover sheet was transmitted to the Board through ESTTA despite proper service on adverse counsel). "The onus is on the party making the submissions to ensure that, at a minimum, all materials are clearly readable by the adverse party and the Board." *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc. dba Watermark Cruises*, 107 USPQ2d 1750, 1758, n.16 (TTAB 2013).

Instead and as a result of Applicant's February 20, 2014 motion, Red Bull contacted the Board ex parte to correct the error in transmitting the complaint. On February 27, 2014, more than

¹ The undersigned downloaded Document No. 1 from TTABVUE on January 15, 2014, February 10, 2014 and again on February 21, 2014. All contained only the cover sheet consisting of four pages that were included as Exhibit 1 to Applicant's pending motion.

a month after the close of the opposition period, counsel for Red Bull stated to Applicant that they conferred ex parte with the Board regarding the merit of Applicant's motion to dismiss which "has now been remedied."² See Exhibit 3 (emphasis added). And in the brief in response to this motion, Red Bull confirms their own error—not the Board's—when they admit conferring with the interlocutory attorney and add that this error "could not have been done by the Board [because] it was not already in possession of the complaint." Red Bull's brief at p.2. Thus, in summary of the facts, Red Bull admits there was a filing error; only the cover sheet was uploaded; the Board could not have solved the problem; the Board did not have a copy of the complaint; and Red Bull attempted to solve the problem more than a month after the deadline for filing the notice of opposition. Consistent with *Weider Publications*, the filing must be given no consideration.

As a result of their ex parte communications on February 27, 2014, the details of which are unknown to Applicant, the Notice of Opposition only then became viewable on TTABVue in Opposition No. 91214448. This also is not in dispute. This was procedurally improper but importantly does not remedy the fact that there was no notice of opposition transmitted to the Board by the deadline of January 23, 2014. See Lanham Act Section 13; see also TBMP § 105.

Without a complaint properly and timely transmitted and readable by the adverse party and the Board, there was no claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). Similarly, without a complaint the proceeding was wrongly instituted. 37 C.F.R. § 2.105(a). Thus the proceeding should be dismissed as a nullity.

Red Bull's recourse must lie in the filing of a petition for cancellation per Lanham Act Section 14 if and when registration issues. *Yahoo! Inc. v. Loufrani*, 70 USPQ2d 1735, 1736 (TTAB 2004).

* * * * *

² The undersigned again downloaded Document No. 1 from TTABVue after February 27, 2014. Including the cover sheets, it is 22 pages long.

Respectfully submitted,
MICHAEL F. BALL



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OPPOSITION No. 91214448 PER FED. R. CIV. P. 12 was deposited with the U.S. Postal Service, postage prepaid for delivery by First-Class Mail on counsel for Red Bull this 25th day of March 2014 as follows:

Martin R. Greenstein
TechMark a Law Corporation
4820 Harwood Road, 2nd Floor
San Jose, CA 95124-5273



Stephen A. Straub

CERTIFICATE OF FILING

I hereby certify that a copy of the foregoing APPLICANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OPPOSITION No. 91214448 PER FED. R. CIV. P. 12 was filed with the U.S. Patent and Trademark Office using the ESTTA filing system on this 25th day of March 2014.



Stephen A. Straub

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RED BULL GMBH

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Opposition No. 91208003
(Parent)
Opposition No. 91214448

EXHIBIT 3
to
APPLICANT’S MOTION TO DISMISS OPPOSITION No. 91214448
PER FED. R. CIV. P. 12

Stephen A. Straub

From: Leah Halpert <LZH@techmark.com>
Sent: Thursday, February 27, 2014 6:41 PM
To: Stephen G. Janoski
Cc: Stephen A. Straub; Martin R. Greenstein; Angel Riordan; Derek M. Palmer
Subject: Our ref: WS 6.015.519 - Red Bull GmbH v Michael Ball - Parent Oppo #91-208,003 - Motion to Dismiss Child Opposition

Dear Mr. Janoski,

We recently received your Motion to Dismiss the child opposition (#91-214,448) in the subject matter. Your argument is that, although the cover sheet appeared on the TTABVue site, the actual Notice of Opposition did not. This was purely an internal error on the part of ESTTA, and has now been remedied:
<http://ttabvue.uspto.gov/ttabvue/v?pno=91214448&pty=OPP&eno=1>

Since this was simply an internal error of ESTTA, the Notice of Opposition was timely filed and received by the Board on January 13, 2014 and properly served upon the correspondent of record at the time - Casimir Cook (with a courtesy copy being sent to Stephen Straub via email as well, since he is who took over the parent case and we wanted to ensure that the Notice was received). As such, please withdraw your motion to dismiss, since there is no basis for it.

Thank you and best regards,
Leah

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